*United States Court of Appeals*

*for the Second Circuit*

# BRIEF FOR APPELLANT

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74-1160

# United States Court of Appeals

FOR THE SECOND CIRCUIT

DAIRYLEA COOPERATIVE, INC.,

*Plaintiff-Appellant,*

—against—

EARL L. BUTZ, Secretary of the Department of Agriculture of the United States,

*Defendant-Appellee,*

PENNMARVA DAIRYMEN'S COOPERATIVE FEDERATION, INC.,

*Intervenor-Appellee.*

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DISMISSING APPELLANT'S COMPLAINT

## BRIEF FOR APPELLANT

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## BRIEF FOR APPELLANT

### Preliminary Statement

This is an appeal from a Judgment dismissing appellant's complaint. The District Court (Carter, *D.J.*) wrote an opinion filed on November 19, 1973, which is reported at 366 F. Supp. 1335 (1973).

### The Issues Presented for Review

1. Does the base-excess plan in Order 4 providing for substantially reduced returns to newly entering producers

—as against existing producers—for a period ranging from a minimum of 5 months to a maximum of 16 months violate the Agricultural Marketing Agreement Act. Specifically

(a) does the order violate the requirement of the Act that prices be uniform to all producers?;

(b) does the order violate subsection (D) of section 608c(5) which provides for the only limitation on producers newly entering an order and is one which can be effective for a period not to exceed 3 months after entry?;

(c) does the order violate the provisions of subsection (G) of the same section providing that no marketing order shall limit the free entry of milk to any marketing area?;

(d) is not the base-excess plan of Order 4 with varying monthly bases for new producers, which is shown by the hearing record to be related to Class I utilization and not to seasonal variations in production, one which could only be properly adopted under adjustment (f)* of 608c(5)(B)—which if applicable would render illegal the order provisions denying newly entering producers a historical base?;

(e) was it not the intent of Congress that the limitations expressed in adjustment (f) authorizing base plans related to class utilization of milk were already inherent in adjustment (d) relating to seasonal base plans by reason of subsections (D) and (G)?

2. Does the decision of the Secretary support the provisions of the order adopted?

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* The provisions of adjustment (f) require that any producer newly entering an order be accorded a base *within 90 days* reflecting his own historical production in outside markets and in addition if he entered the order by reason of the plant to which he delivered becoming regulated by the order, he must *immediately* be accorded such a historical base.

3. Is the decision of the Secretary as to the order's base excess plan supported by evidence in the hearing record?

## Statement of the Case

This case is another of the series of cases in which the Secretary of Agriculture has appeased inside dairy farmers by attempting to exclude outside dairy farmers from what the local producers regard as "their" markets by distortions of marketing order programs adopted under the aegis of the Marketing Act. All such prior efforts have heretofore been uniformly rebuffed by the courts (*infra*, p. 15 *et seq.*).

Plaintiff, Dairylea Cooperative, Inc. ("Dairylea") is a cooperative association of dairy farmers who have heretofore been largely Order 2 producers; its members are located throughout the states of New York, New Jersey, Pennsylvania and elsewhere (JA 3-4).* They are the "outsiders" involved in this case.

Dairylea brought this action against the Secretary of Agriculture of the United States (the "Secretary") challenging the validity of the base-excess provisions of Federal Milk Marketing Order No. 4,** promulgated by the Secretary pursuant to the Agriculture Marketing Agreement Act of 1937, as amended (the "Marketing Act"***), and seeking an injunction and recovery of the amounts by which the returns on sales of its members' milk were diminished by the challenged provisions (JA 15).

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* The designation JA refers to the Joint Appendix.

** A pamphlet edition of this Order has been supplied to the Court. The particular provision challenged is found in §1004.92 of Order 4; there are related implementing provisions of the Order.

*** The relevant provisions of the Marketing Act are reproduced in an Appendix to this brief.

Intervenor, Pennmarva Dairymen's Cooperative Federation, Inc. ("Pennmarva"), is a federation of three cooperatives claiming to represent some 4,500 dairy farmers delivering milk under Order 4. They are the "insiders" in this case. Pennmarva was permitted to intervene as a defendant, and in this case argues in favor of the validity of the challenged provisions of Order 4 (JA 24).

After trial, Judge Carter ruled in favor of defendants, upheld the validity of the challenged provisions, and dismissed Dairylea's complaint (JA 358). Dairylea is before this Court on appeal from Judge Carter's determination (JA 360).

This Court, in deciding this appeal, must once again traverse federal milk marketing regulations which have been described by the Supreme Court as a "labyrinth". *Zuber* v. *Allen,* 396 U.S. 168 (1969). Essential to an understanding of the issues before the Court is a brief discussion of the economic and regulatory background of the milk industry, as well as an explanation of the operation of the challenged provisions. We will thus first turn to this background, then provide a brief explanation of the challenged provisions, and finally relate the specific facts which give rise to the present litigation.

***The Basic Elements of Milk Regulation.***

The largest area for the production of milk and the one having the lowest cost of production is located in the Midwest in the states of Wisconsin and Minnesota. Predominantly such milk finds its way into manufactured products; but with the development of modern technology it is also increasingly available for shipment over long distances as fluid milk. Other production areas are located in the northeast and elsewhere, principally in the vicinity of the large metropolitan areas which provide the markets

for fluid milk. These metropolitan markets are generally referred to as fluid markets or Class I markets although, as will be explained, the federal regulation of fluid milk marketed in these areas also applies to milk produced beyond fluid needs which finds its outlet in manufactured milk products (JA 5-6).

Milk sold for fluid consumption has always commanded a higher price in the market than milk of the same quality used for the production of other dairy products. This is for the reason that "the prices for the milk absorbed into the manufacturing process must necessarily meet the competition of low cost production areas [such as the Middle West] far removed from the metropolitan centers." *United States* v. *Rock Royal Cooperative, Inc.*, 307 U.S. 533 at 550 (1939).

Oversupply has been endemic in the milk industry. This results primarily from the fact that milk production varies widely seasonally while consumer demand tends to be static. Production is lowest in the fall and winter (the short season), and greatest in the spring (the flush season). The dairy herds necessary to satisfy milk needs in the short season produce surplus milk in the rest of the year. (*Zuber* v. *Allen, supra,* at 173). In the absence of federal regulation, chaotic marketing conditions and destructive competition amongst producers resulted, with each producer cutting his price to economically low levels in an effort to obtain the fluid milk market.

The essence of the statutory scheme adopted by the Congress in the Marketing Act to deal with this problem is to provide for the payment of a uniform price to all dairy farmers (producers) whose milk is sold to handlers regardless of the use (*i.e.,* whether as fluid milk or in manufactured dairy products) to which it is put by the particular handler to whom they sell, subject only to spe-

cifically enumerated adjustments relating to volume, market and production differentials, the grade of milk, the location at which delivery of the milk is made to the handler, etc.

The statutory scheme envisions the promulgation of regulations, called "Marketing Orders", by the Secretary. The Secretary has promulgated orders governing the marketing of milk in various geographical areas of the United States. Each order covers a particular fluid milk marketing area or areas.

Order 4 as amended in 1970* covers marketing in the District of Columbia, the State of Delaware and certain counties in the States of Maryland, Virginia, Pennsylvania and Southern New Jersey—basically Philadelphia, Baltimore and Washington, D.C. Order 2 covers marketing in New York and Northern New Jersey. Dairylea has for some time been marketing milk of its members under both orders.

The basic pricing structure under both Orders 2 and 4 is as follows: milk sold by all producers to handlers regulated by the particular order is divided into two classes based on use. Milk sold for fluid use is Class I and carries the highest price. Milk used to manufacture dairy products is Class II and carries a lower price. These class prices are announced each month by a market administrator who is appointed by the Secretary to administer the order. There is a separate market administrator for each of the orders (JA 305-06).

Under each order the total amount of milk used monthly in each class by all handlers under the order is determined,

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* Order 4 was initially issued in 1942 and covered only the Philadelphia market. In 1970, two other orders which had theretofore covered the Baltimore and Washington markets were merged into an amended Order 4.

and then multiplied by the applicable class prices. The total is then divided by the total number of pounds of milk in both classes. The resulting number is the uniform or blend price.

Each producer (or if a member of a qualified cooperative, his cooperative) receives this uniform price (subject to certain adjustments) for the pounds of milk delivered by him to handlers under the respective order, regardless of the use made of his milk by the particular handler to whom the producer sold his milk. The handler however pays for the milk delivered to him based on his class use; and any difference between the prices so payable based on his class use, and the uniform price paid to the producers delivering milk to him, is adjusted through a fund—the Producer Settlement Fund—maintained under the particular order. The handler pays into the Fund or receives payment therefrom for the difference between the uniform price he paid his producers and the class prices payable by him (JA 305).

***Base and Excess Plans.***

As we have noted, each order adopted pursuant to the Marketing Act must provide for the payment of a uniform price subject to specifically enumerated adjustments. One of the adjustments* which has been authorized under the Marketing Act since its adoption in 1935 is

> "(d) a further adjustment to encourage seasonal adjustments in the production of milk through equitable apportionment of the total value of the milk purchased by any handler, or by all handlers, among producers on the basis of their marketings of milk during a representative period of time, * * *" [Section 608c(5)(B)(d)].

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* Hereinafter referred to as adjustment (d).

The basic problem to which Congress addressed itself in this provision is one inherent in the seasonal nature of bovine reproduction.

Cows normally calve in the spring; and the spring therefore is the season when they produce milk in greatest abundance. If left to nature, the number of calves born in the fall and winter is relatively small, the milk produced for the spring calves slackens off, and the supply of milk rapidly becomes insufficient in the fall and winter months.

In *Zuber* v. *Allen, supra,* the Supreme Court described the problem as follows, at pp. 172-3:

> "At the same time the milk industry is characterized by periods of seasonal overproduction. The winter months are low in yield and conversely the summer months are fertile. In order to meet fluid demand which is relatively constant, sufficiently large herds must be maintained to supply winter needs. The result is oversupply in the more fruitful months."

See also *Brannan* v. *Stark,* 342 U.S. 451, 460 (1952).

Adjustment (d), as the legislative history makes clear, was designed to encourage farmers to level this *seasonal* high-low production pattern by appropriate breeding and production practices.

Two types of plans have emerged for levelling seasonal production. One is the so-called base-excess plan and the other is the so-called Louisville plan (discussed *infra,* pp. 39-40n). Order 4 has adopted a base-excess plan and Order 2 has adopted a Louisville plan.*

Base-excess plans establish an economic incentive for level production by providing generally that a producer es-

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* As for the reason for this, see *infra,* p. 43.

tablishes a "base" normally during the short production season (often called the base making period), equal to the average daily quantity of milk he delivers during that short season.

During the following flush production spring season (often called the base payout period) the producer receives a higher "base price" for quantities of milk delivered up to the amount of his base, and a lower "excess price" for milk delivered beyond his base.

In Order 4 the base price averaged about $2 cwt. higher in every month involved in this case than the excess price. The prices for base and excess milk are arrived at as follows:

Excess milk is assigned to Class II and priced at the lower Class II value. Base milk receives a higher price which is a blend of all of the high Class I and only so much of Class II milk as has not been assigned to excess milk.

Prior to the adoption in 1970 of the challenged base-excess plan of Order 4, the order contained a base-excess plan just such as is above described. The base making period was July through December (the short season), and the bases formed during that period were applied *only* in the subsequent base payout period of *March through June* (the flush season). In all other 8 months of the year (*i.e.*, July through February of the succeeding year) the full uniform or blend price was paid without any base and excess adjustment (JA 106).

By the 1970 amendments to Order 4 its base-excess plan was changed significantly. Instead of having a base payout period covering only the spring months of March through June, the base payout period was extended to operate during the entire year—that is from March 1 of one year through February of the next year (JA 7).

The effect of this amendment is that at no time of the year is the producer paid a simple uniform price. Rather, even *during each base making period,* base and excess prices (based upon the base established during the *prior base making period*) are applicable.

This change in the base-excess plan coupled with the newly adopted arbitrary assigned bases for new producers lies at the very heart of this case. The effect of these changes is to give producers newly entering the Order 4 market a net price for their milk of about 10 percent less than old Order 4 producers receive (JA 105), for a period which may be as long as 16 months (see *infra,* p. 12n). The discriminatory nature of these provisions appears without contradiction in the testimony of Dr. Hand who was the principal proponent witness at the amendment hearing, when he said:

> "Under present base plans, base milk [of existing producers] is about 90% of production * * *."

However, §1004.92(e) of the order imposes upon newly entering producers an arbitrary base averaging only 60 percent.

***The Facts Giving Rise to This Action.***

Dairylea had for many years supplied the milk requirements of Johanna Farms, Inc., a handler located in Flemington, New Jersey, and subject to regulation under Order 4, *i.e.,* the prices paid by Johanna to Dairylea are fixed under Order 4. As the business of the Flemington handler grew, so did its milk requirements (JA 307).

In the months of May, June and October, 1972,* it became necessary in order to meet these increased needs for

* Only small amounts were shifted in May and June; the overwhelming majority of the milk involved was shifted in October.

Dairylea to shift milk produced by its members previously regulated and priced under Order 2,* to the Flemington handler, with the result that such milk became subject to Order 4 (JA 307). These producers thereby became subject immediately to the base-excess plan of Order 4 which, as we have said, provides for a base *payout* period during the *entire year.* But for the purposes of establishing a base to cover payment for these shipments in the short season of 1972, Order 4 does not recognize shipments actually made by these producers during the applicable base *making* period which was August through December of *1971*—the preceding year. Instead, Order 4 imposed upon them arbitrary low bases (as provided in paragraph (e) of § 1004.92 of Order 4) averaging 60 percent which is one-third less than and wholly unrelated to their actual historical daily average deliveries to Order 2 handlers during the applicable base making period (August-December 1971).

And, it was further established at the trial, without contradiction, that their true historical bases (which the order denies them) were about 90 percent based on their August-December 1971 shipments (JA 100; Plf. Exh. 3).

Under the provisions of Order 4, the Dairylea producers, did not, until March 1, 1973, receive their true bases of about 90 percent based upon their own historical deliveries

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* Some of the Dairylea producers had been delivering to Dairylea's Honesdale plant and became Order 4 producers by virtue of the shipments to the Flemington handler making the Honesdale plant an Order 4 plant. The remainder of the Dairylea producers had delivered their milk to a bulk tank unit which in legal effect is simply a plant on wheels and when the unit's receipts were delivered to the Flemington handler the producers involved all became Order 4 producers. Order 2 recognizes that a bulk tank unit is simply a plant on wheels (see Secretary's decision under Order 2 of September 13, 1961, 26 Fed. Reg., 8847). Order 4 gives somewhat similar recognition to bulk tank units as accounting entities (see §1004.9(c) and §1004.73(d) and the Secretary's decision under Order 4 at 35 Fed. Reg. 7930).

during the August through December 1972 period. Dairylea producers who shifted in May 1972 were penalized for 10 months, those who shifted in June for 9 months and those who shifted in October for 5 months.*

This resulted in a diminution of about $262,500 in the returns of Dairylea's producers (JA 312). This penalty was imposed on them even though their entry into Order 4 enhanced the prices of the Order 4 producers by bringing in a significantly larger amount of Class I sales (JA 124-25; 283-86).

There is, it is true, statutory authority for a proper base-excess program for the limited purposes of levelling out *seasonal* variations in supply due to the normal annual reproductive cycle of the spring flush period and the fall and winter short season. However, it is also clear that such programs may not have appended to them terms which are *wholly unrelated to levelling production seasonally*, and which serve only the ulterior purpose of limiting the entry of outside producers into the market by economic sanctions whereby identically situated producers with the same level pattern of production get widely varying prices in violation of the Marketing Act's requirement of uniform prices to producers.

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* Five months is the minimum period the penalty bases are applicable. For other producers the penalty bases can be applicable for from 14 to 16 months. For instance, if a producer first becomes an Order 4 producer in January, the arbitrary base automatically applies through February of the following year, a period of 14 months. If he entered the pool in November or December, the arbitrary base would be applicable through February of the second next ensuing year, a period of 16 months, because though he would theoretically be entitled to a historical base based on his deliveries during the months of November and December (61 days) for these two months of the year in which he entered the pool, his production months would be divided by four months (120 days). This would give him a base of about 50% which would be less than the arbitrary bases assigned for these months (70% for November; 60% for December) under Order 4, §1004.92(e).

***The Decision of the District Court***

The District Court totally misapprehended the way in which the Order 4 base-excess plan operates. Thus, in its opinion, the District Court stated that the Order 4 plan allocates "to each producer a base equal to his Order 4 marketings between August and December and [gives him] . . . reduced payments for any deliveries *made during the following flush season* which exceed the base amount." * (JA 348). If Order 4 had so provided Dairylea would not have brought this action.

What Order 4 does provide is for greatly reduced payments not only in the flush season, as the District Court erroneously thought, but also throughout the *rest of the year*—that is in the short season (the fall and the winter) as well, and it was then that Dairylea's producers marketed the bulk of the milk here involved. Perhaps because of this misapprehension the District Court felt that the discriminations complained of were not serious and could be tolerated, saying that "absolute equality among producers is not required by Section 608c(5)(G) or by constitutional principles" (JA 355).

The District Court also erroneously held that the statutory authorization for base-excess plans was "of a different character" than the authorized adjustments in the other subdivisions of the statute, which appear *pari passu* as subdivisions (a) through (f), and therefore did not require economic justification, that is, proof that the milk of Dairylea's producers was worth less than that of the other producers; such proof as the Supreme Court had held necessary in the *Zuber* case, discussed *infra* p. 15, to justify the other authorized adjustments (JA 354).

These and other errors in the District Court's opinion are dealt with more fully below in our argument.

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* All emphasis in this brief is supplied unless otherwise noted.

# ARGUMENT

## POINT I

**The District Court Erred in Not Finding That the Three Basic Requirements of the Marketing Act Were Violated by Order 4.**

It should be made clear at the threshold that the power of the Secretary is strictly limited by the Marketing Act; he is not given a broad mandate under a generally worded statute. *Zuber* v. *Allen, supra,* at 168. On the contrary, "as emphasized by recent court decisions, the text and legislative history of this Statute make it plain that the Secretary was required to operate within the narrow confines of powers expressly granted." (*Fairmont Foods Co.* v. *Hardin,* 442 F.2d 762, 766 [C.A.D.C., 1971]).

The Marketing Act prescribes three basic requirements for all marketing orders. These are *first,* that the prices payable to producers must be uniform, subject only to the specifically enumerated adjustments; *second* that all dairy farmers must be allowed free access to regulated markets; and *third,* that dairy farmers newly entering a market must be accorded equal treatment except for a period not to exceed three months.

### A. *The Requirement of a Uniform Price—Violated here.*

The Supreme Court in *Zuber* v. *Allen, supra,* at 179 said:

> "The foundation of the statutory scheme is to provide uniform prices to all producers in the marketing area, subject only to specifically enumerated adjustments."

Efforts by the Secretary to circumvent the limitations inherent in this policy have been consistently rejected by the courts.

In *Brannan* v. *Stark, supra,* producers who were not members of cooperatives attacked a provision of the Boston Order under which, in determining the blend price (payable to all producers), a deduction was made and the amount thereof was paid to cooperatives which were not required to perform any services of benefit to the market (as contrasted with services of benefit only to their own members). The effect of this deduction, the Court noted, was that the receipts of non-member producers for a given quantity of milk were smaller than those of the cooperatives' members. The Court struck down the provision holding it was "inconsistent with §8c(5)(B), which requires the payment of uniform prices to all producers for all milk delivered. . . ." 342 U.S. at 463.

In *Zuber, supra,* a Marketing Order provided for a differential (in economic effect not unlike the provisions challenged here) which gave nearby farmers higher prices for milk than more distant farmers. The Supreme Court struck down the differential because of "the legislative history indicating that the statute contemplates adjustments primarily for *economic costs* to handlers that are absorbed or reduced by the producers" 396 U.S. at 191.

These cases establish that only matters of marketwide *economic value* supplied by an individual producer may be the basis for a differentiation in returns to producers. This is particularly true as to differentials under a base-excess plan in view of the fact that §608c(5)(B) clause (d) specifically limits this adjustment to the uniform price to one for "equitable apportionment of the total *value of the milk* purchased by any handler, or by all handlers".

At this point it should be noted that Dairylea's members here involved were, prior to shifting into Order 4, subject to the Louisville Plan of Order 2, the other type of plan designed to level seasonal production; and, as the record

makes clear, Dairylea's members had achieved as much levelling of seasonal production as had Order 4 producers under Order 4's Base and Excess Plan (JA 97-101; *cf. infra* pp. 39-40).

The economic value* of plaintiff's producers milk with level production is just as great whether they were producers under Order 2 or Order 4 (JA 172), and to require them to accept a lower price by giving no recognition to their historical level production is illegal.

**B. *Free Access to Markets—Violated Here.***

From the beginning, the Marketing Act has had as one of its touchstones the proposition that all dairy farmers must have free access to regulated markets (*Lehigh Valley Cooperative Farmers, Inc.* v. *United States*, 370 U.S. 76 (1962); *Polar Ice Cream & Creamery Co.* v. *Andrews*, 375 U.S. 361, 379 (1964).

Subsection (G) of section 608c(5) of the Act provides:

> "No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States."

The legislative history and purpose of subsection (G) (known as the Andresen Amendment) was exhaustively reviewed by the Supreme Court in the *Lehigh Valley* case,

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* There is, of course, an economic benefit to a handler in having a level production producer. A variable producer with large amounts of surplus milk in the spring and limited amounts of milk in the fall and winter requires the handler to maintain surplus manufacturing and handling facilities for the handling of the excess spring production. These facilities, however, lie idle during the short season when the milk production is needed for the fluid milk market (JA 118-19).

*supra.* There the Secretary had included in Order 2 a provision for so-called compensatory payments on non-pool milk sold into the marketing area by outside farmers. This the Supreme Court found violated the express policy of the Act, holding that

> "* * * §8c(5)(G) was compendiously intended to prevent the Secretary from setting up, under the guise of price-fixing regulation, any kind of economic trade barriers whether relating to milk or its products." (370 U.S. at 97).

The Court adopted a broad reading of subsection (G) notwithstanding the fact that if literally read the words of subsection (G) would seem to bar only *limitations* on the entry of milk *products* and not on the entry of *raw milk,* the Court saying at page 97:

> "Although the words of §8c(5)(G), 'in any manner limit,' must be taken, in the context of their legislative history, as referring only to milk products, that history likewise makes it clear that as regards milk the word 'prohibit' refers not merely to absolute or quota physical restrictions, but also encompasses economic trade barriers of the kind effected by the subsidies called for by this 'compensatory payment provision.'"

The same considerations which led to the decision in the *Lehigh Valley* case are equally applicable here. The handler buying the milk from newly entering producers pays into the pool the full class price on his Class I utilizations, but the newly entering producers, because of the arbitrary low bases imposed upon them, are forced to forego about 10 percent of their pro rata share from the pool and it is paid over to the inside producers, who receive a correspondingly higher price. In effect the order requires the

newly entering producers to subsidize *pro tanto* the inside producers—an illegal result as the Supreme Court held in the *Lehigh* case at pp. 89-90.

Though it was established by the uncontradicted evidence in this case that the effect of the arbitrary bases was to reduce Dairylea producers' returns by 10 percent, the District Court held that giving them these arbitrary bases was "substantial" and "takes the order out of the realm of the 'almost insuperable trade restriction' described by the Supreme Court in the *Lehigh Valley* case" (JA 356).

But the District Court misconstrued the *Lehigh Valley* case; that case did not turn on the precise amount involved but rather on the broad principle of barring any kind of economic trade barrier. The *Lehigh* case did not hold that there must be the economic equivalent of an absolute prohibition of entry before subsection (G) was violated.* What the Supreme Court held was that *economic* restrictions as well as provisions directly excluding outside milk were illegal if, as subsection (G) puts it, they tend *"in any way to limit"* the marketing of outside milk or force outside milk to "subsidize" inside milk (*Lehigh* at p. 97, quoted *supra* p. 17). Certainly the 10 percent reduction in the price to newly entering producers (paid over to the old producers) has that effect.

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* The Market Administrator's official figures under Order 2 show that in 1961, the last year in which the invalid compensatory payment provision was in effect, an aggregate of 37,144,793 pounds of milk subject to the compensatory payment entered the Order 2 market on which payments of $779,576.34 were made into the Order 2 pool on outside milk. This shows that the *Lehigh* decision did not involve an absolutely prohibitive economic barrier to the entry of non-pool milk as Judge Carter thought.

As the Supreme Court pointed out in *Lehigh* (370 U.S. at 92) Congress was assured under the Marketing Act that

> "the Secretary was not authorized to require anything more of milk coming into a marketing area than that it 'comply with the same conditions which the farmers and distributors comply with in that region.' 79 Cong Rec 9462."

The Supreme Court also made it clear that the Marketing Act required absolutely *equal* treatment of producers whether inside or outside the order, quoting with emphasis from a statement by Congressman Jones in the Congressional Record that

> "Under the provisions of this bill if a price were fixed in this particular area * * * then if anyone bought milk from an outside area and brought it in he would be compelled to *pay the producer the same price that was being paid the producers within the area*" (370 U.S. at 96; emphasis by the Supreme Court.)

In point of fact the differential struck down in the *Zuber* and *Brannan* cases involved much less than 10 percent of the affected producers' returns. In the *Zuber* case the differential struck down averaged 12½ cents per cwt., a reduction of 2.75 percent from the uniform price.* In the *Brannan* case, *supra*, the cooperative differentials struck down ranged from 1 to 2¢ per cwt. and "in each year constituted no more than a fraction of one percent of the total value of milk marketed" (342 U.S. at 455, note 4).

The District Court here completely ignored the legislative history and erred as to the intent of Congress when it said:

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* Calculated from the officially published figures of the Boston federal milk market administrator.

> "Since the historic context precludes the assumption that Congress contemplated a uniform national system, it is safe to assume that it did not intend, as plaintiffs argue, that producers be given credit in a region operating under the base-excess plan for milk marketed outside that region during the base-making period." (JA 354)

The error is evident not only from the general legislative history that we have reviewed but from the specific legislative history discussed *infra* p. 29 *et seq.* with respect to adjustments (d) and (f). As is there pointed out, adjustment (f) *in express terms* mandates giving producers bases predicated on milk marketed *outside* the marketing area during the base making period.

Indeed the literal wording of adjustment (d) requires the Secretary to give base period credit to a producer for all his marketings of milk from his production facilities during the representative base period *whether to handlers regulated by Order 4 or Order 2 or otherwise.* The phrase in adjustment (d) defining the base period relates it to "their [the producers] marketings of milk during a representative period of time". Significantly, it does not say "marketings *to handlers regulated by the order.*" The wording is *pari passu* with the wording of adjustment (f) which likewise refers to "marketings of milk * * * during a representative period". But clauses (iii) and (v) of adjustment (f) discussed *infra* at pp. 26-27 clearly indicate that the phrase "marketing of milk" in the case of producers newly entering into the pool includes all "their past deliveries of milk [in other markets] during the representative period from the production facilities from which they are delivering milk under the order".

The Marketing Act, as subsection (G) makes clear, was not framed in any parochial spirit which would permit

existing producers to monopolize the market. It was framed on a national basis, as Judge Cardozo said in a somewhat similar context, upon the theory "that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division", *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U.S. 511, 523 (1935); see also *Hood* v. *Du Mond*, 336 U.S. 525, 532 (1949).

Judge Carter's only attempt to deal with our argument on this point was his statement that

> "Absolute equality among producers is not required by Section 608c(5)(G) or by constitutional principles." (JA 355)

In support of this statement, he relies upon *Lewes Dairy, Inc.* v. *Freeman*, 401 F.2d 308 (C.A. 3, 1968), *cert. denied*, 394 U.S. 929 (1969), and *Sunny Hill Farms Dairy Co., Inc.* v. *Hardin*, 446 F.2d 1124 (C.A. 8, 1971), *cert. denied*, 405 U.S. 1023 (1972).

The *Lewes* case involved a handler, not a producer. The handler was not, moreover, complaining that he was being treated differently under the order from any other handler under the order. Rather, the handler, whose sales were both inside and outside the marketing area covered by the order, was complaining that as he was fully regulated by the order as to the prices he had to pay for milk (whether sold inside or outside the marketing area covered by the order), he was at a disadvantage with respect to his sales *outside the area* covered by the order in his competition with *unregulated* handlers. The court in *Lewes* held that full regulation of the handler was necessary to maintain orderly marketing. The case in no way dealt with or approved the payment of lower prices to one class of producers governed by an order as against another. It simply is irrelevant to the issues before this Court.

To the extent the *Lewes* court discussed *Lehigh,* it is entirely consistent with what we have said. The court noted at p. 314 that it had invited the handler to show, as the handler in *Lehigh* had shown, that the order had not given it equal treatment, but the handler failed to show any discrimination against it. The handler was treated the same as all other handlers, and thus the court held there was no trade barrier.*

*Sunny Hill* also involved a handler, not a producer. There, the handler challenged the provision of an order which required that it pay a location differential of 15¢ a cwt. for milk it purchased. Unlike the differential in *Zuber,* it was properly based on the location of the point of delivery of the milk as required by the Marketing Act based on the economic value at that point. To the extent the case sanctions an adjustment to the uniform price, it sanctions an adjustment expressly permitted by and complying with the Marketing Act (446 F.2d at 1130).

Neither of these cases support Judge Carter's statement, nor in any way detract from what we have said—namely, that the lower prices paid to newly entering producers under Order 4 violate the statute.

### C. *The Statutory Prohibition Against Any Limitation on Producers Newly Entering the Market Exceeding 3 Months in Duration—Violated Here.*

Section 608c(5) of the Marketing Act specifically provides that orders shall contain one or more of certain

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* The *Lewes* court, quoting with approval the decision in *Sterling Davis Dairy* v. *Freeman,* 253 F. Supp. 80 (D.N.J. 1965) noted that the "crux of the *Lehigh* ruling rests on the actual discriminatory nature of the rates * * *." (401 F.2d at 314). Moreover, the *Lewes* case dealt with the *exportation* of regulated milk produced for a regulated market to an outside unregulated market. Subsection (G) of the Act deals with the reverse situation—the importation into a regulated market of unregulated milk produced by outside producers.

specified terms and conditions, and *"no others"*. As to newly entering producers, it specifies in subsection (D) that an order may only contain a provision:

> "(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection."

The Supreme Court in the *Lehigh* case held this subsection contains the *only* exception to uniformity of price treatment and free access to markets permitted by the Marketing Act, quoting the Senate Committee Report* referring to subsection (D) in which it is said:

> *"This is the only limitation upon the entry of new producers—wherever located—into a market, and it can remain effective only for the specified 3-month period."* (p. 95—emphasis by the Supreme Court)

As we show in more detail, *infra* pp. 39-41, subsection (D) was specifically addressed to the problem of producers "sporadically" shifting in and out of a market. If such a problem did exist here, as the District Court seemed to think, the Secretary illegally chose in the case at bar to try to fashion another remedy beyond his statutory authority.

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* The same statement appears in the House Report (74th Cong., 1st Sess., Report No. 1241) at p. 5.

The District Court did not discuss this point at all and plainly erred in not holding that the provisions of the Order 4 base-excess plan were clearly illegal inasmuch as they involve an integrated plan for reducing returns to newly entering producers for a period ranging from 5 to 16 months. (*Supra*, p. 12n)

## POINT II

**The District Court Erred in Not Finding That the Limitations of Subsection (D) and (G) Apply to Base-Excess Plans as Well as to Other Base Plans and Necessarily Require the Granting of Historical Bases to Newly Entering Producers Like Those Accorded Old Producers.**

The base-excess plan under Order 4 is not a plan designed to level *seasonal* flush spring production as against short fall-winter production of milk inherent in the natural bovine reproduction cycle. *Rather it is one intended to tailor milk production to Class I needs.* This is discussed in detail below at p. 27.

The importance of the distinction is that if the plan were simply one designed to level seasonal production, it would be governed by adjustment (d) of Section 608c(5)(B). On the other hand if it is a plan designed to tailor production to Class I needs, it is governed by adjustment (f) of the same section. If governed by adjustment (f), clauses (iii) and (v) of that adjustment in express terms mandate giving a full historical base (based on their past deliveries to outside markets) to all newly entering producers—within 90 days of their entry into the market or immediately if they enter by virtue of their delivery plant shifting into the pool.

Moreover, regardless of how this question is decided, we shall show below (p. 29 *et seq.*) that it was the Congressional intention that the very same requirements as are expressly spelled out in adjustment (f) were already implicit in adjustment (d) by reasons of subsections (D) and (G) of the Act. We shall, therefore, turn first to an analysis of adjustment (f) as contrasted with adjustment (d) and then show that the requirements of adjustment (f) are inherent in adjustment (d) so that whether the plan is a true base-excess plan or another type of base plan, the Secretary is required to afford newly entering producers true historical bases.

***Comparison of Adjustment (f) With Adjustment (d).***

Adjustment (d) as we have said is intended to provide authority for seasonal levelling plans. It finds its origin in the Agricultural Act of 1935 which provided in subdivision (d) for an adjustment, "equitably to apportion the total value of the milk * * * among producers and associations of producers on the basis of their *production** of milk during a representative period of time." The accompanying House and Senate Reports both made it clear that the purpose of this adjustment was "to eliminate, so far as possible, *violent seasonal* fluctuations in the available milk supply" (Senate Rep. No. 1011 at page 11; House Rep. No. 1241 at page 10). This is explicitly spelled out in the Agricultural Act of 1970 which governs this case, for adjustment (d) authorized in that Act provides for:

> "(d) a further adjustment to encourage *seasonal* adjustments in the production of milk through equitable

* The 1937 Act changed the wording "production" to "marketing" in order to obviate the constitutional question raised by *United States* v. *Butler*, 297 U.S. 1 (1936), 75th Cong., 1st Sess. House Rep. No. 468 (1937). It effected no real change in its meaning.

apportionment of the total value of the milk purchased by any handler, or by all handlers, among producers on the basis of their *marketings* of milk during a representative period of time * * *".

The accompanying Congressional Reports confirm that adjustment (d) was intended only to authorize *seasonal* levelling plans.*

On the other hand, adjustment (f) of the 1970 Act provides for base plans which limit production *in line with class utilizations* (essentially Class I utilization). As pointed out, the first sentence of adjustment (d) provides for an adjustment "to encourage seasonal adjustments". In contrast the first sentence of adjustment (f) quoted in the appendix is identical in language except that it omits the phrase "to encourage seasonal adjustments" and adds the phrase that the adjustment may "reflect the utilization of producer milk * * * in any use classification or classifications". Thus the difference is whether the plan is one intended to level the normal spring and fall production cycles or is one intended to bring production into line with class utilization. If it is the latter, it can only be adopted under adjustment (f) which expressly provides in:

Clause (iii) that dairy farmers not delivering milk as producers under the order upon becoming such producers by reason of the plant to which they are making deliveries becoming a pool plant under the order shall be *immediately* provided with bases "based on their past deliveries of milk on the same basis as other producers under the order"; and further provides in:

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* Senate Rep. No. 1154, 91st Cong., 2d Sess. (1970) states: "The new clause (d) retains and separately states existing authority for *seasonal* base-excess plans (also known as base-surplus plans) in milk marketing orders. Such provisions were contained in the act as effective prior to 1965 * * *". 1970 U. S. Code Cong. & Admin. News 4788, 4803.

Clause (v) that in any event dairy farmers not delivering milk as producers under the order upon becoming producers under the order shall within 90 days be provided with bases "based on their past deliveries of milk * * * from the production facilities from which they are delivering milk under the order on the same basis as producers under the order."

It is clear from the testimony submitted at the promulgation hearing on behalf of Pennmarva by Dr. Hand who was the chief witness testifying for the present base-excess provisions that the purpose of providing for the 12 months payout period and for the monthly variations in the arbitrary bases assigned to newly entering producers was *not* to accomplish *seasonal* levelling of spring and fall production cycles but rather to bring fall and winter production *into line with Class I utilization.* Thus he testified (Joint Exh. 1, Exh. 14, pp. 3-4):

> "*Use of 12-month Base*—The seasonal pattern of production in the Middle Atlantic region has improved over the years and is now as level as the seasonal pattern of Class I sales. The major discrepance between the two series of data is that Class I sales are generally higher than the annual average in the last four months of the year in which production per producer is generally lower than the annual average the last four months of the year.*

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* Dr. Hand's recognition of the fact that the statistical data showed that production tended to be lower and sales higher in the last four months of the year undermines his contention that it was necessary to limit production in the last four months. He further admitted on cross examination at the trial that the possibility of excess production in these last four months was very remote and distant (JA 275-278; see also testimony of Jones, Joint Exh. 1, p. 953).

"It is our opinion that continued use of a short base-paying period will result in greater expansion of production during the *fall* months than is *necessary to meet Class I needs* plus a reasonable reserve and a shortage of milk in the months of March through June, with the possible exception of May. In order to hold the gains already attained in leveling seasonal production and to provide the correct economic pressure to *direct future changes in production relative to sales,* a 12-month seasonal base plan should be substituted for the present plan.

* * *

"Under present base plans, base milk is about 90 percent of production and approximately 80 percent Class I. Thus, the 50 percent option* would result in about 40 percent Class I utilization."

Dr. Hand thus admits that the seasonal pattern of production then prevailing under the Order was level. He advances as the sole reason for the 12-month base operating period the desire to curtail a possible "greater expansion of production during the fall months than is necessary to meet Class I needs"; he proposes it in order "to provide the correct economic pressure to direct future changes in production relative to [Class I] sales",—all matters of utilization which are proper to be taken into account only if the plan is one authorized under adjustment (f).

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* This refers to the arbitrary assigned bases challenged here. In its post promulgation hearing brief before the Secretary Pennmarva suggested that in lieu of the "50 percent option" the varying monthly amounts now in the order averaging 60 percent be adopted. This was not supported by any further evidence but nevertheless was adopted in the Secretary's decision, 35 Fed. Reg. at 7937, column 2. (See *infra,* p. 38.)

***The Requirement of Full Historical Bases for Newly Entering Producers Expressed in Adjustment (f) Is Implicit in Adjustment (d).***

The legislative history of the 1970 Act makes it clear that the various provisos which appear expressly in adjustment (f) were thought to be already implicit in adjustment (d) by reason of the provisions of subsections (D) and (G) of the Marketing Act. The specific provisions spelled out in connection with adjustment (f) were simply a restatement in detail of the general policy and were added as a matter of caution insisted on by the representatives of the Midwestern dairy states, particularly Representative Zwach of Minnesota.

***The Zwach Amendment***

Clause (v) of adjustment (f) was added to the 1970 bill by an amendment proposed by Representative Zwach of Minnesota. He explained his intention on the floor of Congress as follows (116 Cong. Rec. 27144 August 4, 1970):

> "Mr. Zwach. Mr. Chairman. I * * * would like to clarify as best I can the intent of an amendment which I proposed and the committee unanimously accepted concerning the class I base plan.
>
> "My amendment * * * reads as follows: (v) notwithstanding any other provision of this Act, dairy farmers not delivering milk as producers under the order, upon becoming producers under the order, shall ninety days later, *pursuant to the provisions of section 8c(5)(D) of this Act* be provided with respect to milk delivered under the order, allocations based on their past deliveries of milk during the representative period from the production facilities from which they were marketing milk during the representative period on

the same basis as other producers under the order on the effective date of order provisions authorized under this clause (f)."

The italicized words make it clear that the intent was simply to restate specifically in adjustment (f) the requirements already implicit in subsection (D) against limitations on the entry of outside producers.

Mr. Zwach continued:

"This amendment was carefully worked out after weeks of discussion and as the author of it, I want to make it very clear that this amendment is designed to give all established dairy farmers a realistic opportunity to have competitive access to class I markets throughout the Nation.

"The Agricultural Marketing Agreement Act of 1937 was enacted only after long and careful consideration of the dangers to both producers and consumers of permitting certain groups to gain control of and limit access to specific markets. It was specifically to protect producers and the public against such possible dangers that 8c(5)(D) was introduced and adopted with this provision.

* * *

"Equally as important was the amendment sponsored by the late August Andresen of my State of Minnesota. It was also found to be a necessary protection to gain adoption of the original act.

"The Andresen amendment states:

(G) No marketing agreement or order applicable to milk or its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or

product thereof produced in any production area in the United States.

"These provisions were found necessary as a part of the act for two reasons; First, to assure the free movement of milk in interstate commerce and prohibit barriers adopted at the request of producers distributing in an area at the time of Federal order promulgation, and second, to prevent the undue exploitation of consumers by preventing the free entry of milk from other producers."

The broad scope of the Zwach amendment was also brought out on the floor of the Senate by Senator Nelson of Wisconsin, 116 Cong. Rec. 31808 (September 15, 1970), who said:

"In my judgment, this provision makes congressional intent absolutely clear that there must be the right of access in both physical and economic terms in all milk markets across the country."*

In addition, the 1970 law expressly and emphatically reaffirmed the Congressional policy of free entry to markets, by stating in Section 201:

"(d) It is not intended that existing law be in any way altered, rescinded, or amended with respect to section 8c(5)(G) of the Agricultural Adjustment Act, as re-enacted and amended by the Agricultural Marketing

* To the same effect: Representatives Thompson and Steiger of Wisconsin, 116 Cong. Rec. 27145 (Aug. 4, 1970); Representative Nelson (Minnesota) at 27489 (Aug. 5, 1970); Representative Sisk (California) at 27126 (Aug. 4, 1970); Representative Latta (Ohio) at 27127 (Aug. 4, 1970); Representative Sebelius (Kansas) at 27151 (Aug. 4, 1970); Representative Miller (Ohio) at 27190; and U. S. Secretary of Agriculture Harding, quoted at 27138 (Aug. 4, 1970).

Agreement Act of 1937, as amended, and such section 8c(5)(G) is fully reaffirmed."

This review of the law makes clear the continuing vitality of subsections (D) and (G) of the Marketing Act. These provisions govern any base-excess plan authorized under adjustment (d). Any argument that Congress by spelling out protections for producers in adjustment (f) intended to leave defenseless producers subjected to similar plans under adjustment (d) is plainly contrary to the Congressional history and wrong.

Thus if the plan is, as we believe, one authorized only under adjustment (f), it is clearly illegal by the express terms of that adjustment; and if it is, contrary to our belief, a plan authorized by adjustment (d), it is illegal because adjustment (d) incorporates the same requirements as adjustment (f) by virtue of subsections (D) and (G) of the Act.

## POINT III

**The District Court Erred in Failing to Find That the Arbitrary Bases Assigned to Newly Entering Producers Were Illegal Inasmuch as the Only Basis Authorized for Adjustments (d) and (f) Is One Predicated on the Producers' "Marketing of Milk During a Representative Period of Time".**

Both adjustments (d) and (f) require that they be predicated "on the basis of *their* [*the producers*] *marketings of milk during a representative period of time*". What Order 4 does, however, is to completely disregard the marketings of the newly entering producers during the representative period of time (namely, the prior base making period) and to impose on them arbitrary low bases

which are wholly unrelated to their historical marketings, and designed to reduce their returns.

It appears right on the face of Order 4 that the bases accorded to newly entering producers are in no way predicated on their marketings of milk during the historical representative period in the past. On the contrary they are arbitrarily based on their *current* marketings of milk under the order during the *current period of shipment*. This is not a basis authorized by the statute. The District Court completely overlooked this point.

## POINT IV

**The District Court Erred in Not Finding That the Provisions of Order 4 Were Unconstitutionally Discriminatory in That They Gave an Existing Producer the Choice of Either His Historical Base or the Arbitrary Base Accorded Newly Entering Producers Whereas Newly Entering Producers Are Only Accorded the Arbitrary Base.**

The plan here challenged gives to an inside Order 4 producer a choice either of a base based on his historical production or of the arbitrary base provisions of § 1004.92 (e), whichever is most advantageous.* Such a choice is denied to newly entering producers who are limited to the arbitrarily assigned base.

This is not merely illegal; it also violates the constitutional requirement of due process. *Vaughn-Griffin Packing*

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* The Secretary seems to have been obsessively concerned with a desire to do justice to the old producers. Thus he said at 35 Fed. Reg. 7937, col. 2 "To insure equity between established producers and new producers, provision must be made whereby a producer with an established base [*i.e.*, an old producer] can give up such base by notification to the market administrator and have a new base computed each month on the same percentage [the arbitrary assigned bases] as is applicable to new producers."

*Co.* v. *Freeman,* 294 F. Supp. 458 (M.D. Fla. 1968), *aff'd,* 423 F.2d 1094 (C.A. 5, 1970).

That case was decided under the parallel provisions of the Marketing Act covering the marketing of grapefruit under Section 608c(6)(C) which provide that a marketing order shall provide for:

> "(C) * * * methods for allotting, the amount of any such commodity or product * * * which each handler may market * * * under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity or product * * * to be marketed * * * during any specified period * * * shall be equitably apportioned among all of the handlers thereof."

The District Court held, 294 F. Supp. at 465:

> "In addition to claiming the method for issuance of a prorate base to a new handler is contrary to the statute, plaintiff contends it is discriminatory as to old handlers. Whereas a new handler gets a prorate base under the Order from grapefruit under his control, among other factors, the fixing of a prorate base for an old handler eliminates any consideration of the amount of fruit under the old handler's current control and rests entirely on the record of past shipments. * * *
>
> "Such difference in the treatment of handlers does not provide the 'uniform rule' required by 7 U.S.C. §608c (6)(C).
>
> * * * *
>
> "Due process requires equal application of the law except where based upon reasonable classification. For

> the purpose of determining a current allotment there is no reasonable distinction between an old handler and a new handler which would justify issuing allotments upon two entirely different standards."

Further, when the 12-month base payout plan of Order 4 was adopted in May 1970, special provisions were made for existing Order 4 producers. It was provided that the first base payout period under the new plan would commence March 1971; but the first base making period was August-December *1970*. During that first base making period in 1970 a full uniform price without base-excess adjustments was paid to all producers. Thus the existing Order 4 producers were permitted to form their bases for the new plan without any penalty whatever (see *supra* pp. 9-10).

Subsequently entering producers however, even if they entered at the beginning of a base making period, immediately begin receiving prices with base-excess adjustments subject to the arbitrarily assigned low bases which, as we have pointed out, reduce their current returns by 10 percent. As we have shown, it could be as long as 16 months before a newly entering producer is operating with a full historical base; and during that 16-month period he would be receiving less for his milk, regardless of how level his production in fact was.

This is plainly under the *Vaughn* case an illegal and unconstitutional discrimination.

## POINT V

**The District Court Erred in Failing to Find That the Base-Excess Plan Is Supported Neither by the Secretary's Decision Nor by the Hearing Record.**

Order 4 was promulgated by a decision of the Secretary reported in 35 Fed. Reg. 7924 (May 22, 1970), after a rule making hearing. Under applicable provisions of law (7 U.S.C. 608c(4) and (17), the "order and *all* of the terms and conditions thereof" must be supported by the evidence at the hearing. In addition, the stated findings and rationale of the Secretary's decision must support the order issued. *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943); *Blair* v. *Freeman*, 370 F.2d 229 (C.A.D.C., 1966).

In this point we show that the provisions here challenged fail in both respects.

***No Record Support for the Secretary's 12-month Payout Plan.***

As we have earlier indicated, the change from a four-month (March-June) to a 12-month base payout period is at the heart of this case.

Under the prior plan Dairylea's members could have entered Order 4 at the beginning of the July-December base forming period, received full blend prices then just as all other Order 4 producers (since the base payout period was not operative in the short months), and would have formed true historical bases without penalty for use during the subsequent March-June base payout period. There would thus have been no diminution in their short season returns during the base forming period.

The new plan, however, provides for the payment of base and excess prices during the entire year (a fiscal year from March through the following February) and thus limits

the prices newly entering producers receive for their shipments *during* the base making period. It is on these shipments during the short season (when milk is most needed and most valuable) that newly entering producers are subjected to the arbitrarily low assigned bases averaging 60 percent. They are required to make their base for the *ensuing* milk year by shipping their milk during the *current* short season (which is the base making period) at arbitrarily reduced returns from the pool—with the amount deducted being paid over to the old Order 4 producers.

It is this point that the District Court completely misunderstood (*supra*, p. 13). The base payout provisions are not as Judge Carter thought operative only in the flush.

The only statements in the Secretary's decision which could conceivably relate to the use of the 12-month* base paying period are the following:

> "A 12-month base plan, with transfers limited to circumstances of death or discontinuance of the dairy enterprise, and with provision whereby new producers may acquire bases reflecting an equitable percentage of their monthly deliveries, was proposed by Pennmarva as the most appropriate means of insuring continuing even production." [35 Fed. Reg. 7936, col. 3]

This is only a restatement of Pennmarva's proposal.

The Secretary's decision continues:

> "The base and excess plan herein adopted would establish a base for each producer * * *. Such bases would be computed by the market administrator to be effec-

* As we have pointed out *supra* p. 12n, the arbitrary base for newly entering producers could in fact be effective for as long as 16 months.

tive for the 12-month period of March 1 through February of the following year."

That is all there is. The decision is absolutely devoid of anything tending to show that the 12-month base operating period was necessary or even appropriate for a *seasonal* plan intended to level production between the flush and the short months.

Furthermore there was no testimony in the record showing the economic basis for the arbitrary bases, varying as they do, from month to month from 50 to 70 percent (Order 4, §1004.91(e)). These provisions seem to find their entire "support" in a post promulgation brief filed by Pennmarva with the Secretary.

All that the Secretary's decision says on this subject is found in 35 Fed. Reg. 7937, col. 2:

> "Pennmarva initially proposed that a new producer might acquire a base equal to 50 percent of his deliveries each month until such time as he had delivered four months during the next following base-forming period. In its posthearing brief, however, proponent suggested that the 50 percent apply only to the months of March through June, that 60 percent apply in the months of January, February, July, and December and that 70 percent apply in the remaining 4 months of August through November.
>
> "It is concluded that the latter percentages will provide reasonable treatment for new producers and that no further provision is needed for the purpose of providing interim bases. Bases computed on these percentages would not appear to be so high as to encourage new producers to come on the market at a time *when their milk is not needed for Class I purposes.* At the same time, they would not be so low as

to discourage any producer who intends to become permanently associated with the market."

Excluding a producer when his milk is not needed for Class I purposes is not a legal purpose. More significantly, the Secretary's decision gives no reason for applying the base payout provisions in the short season—the major innovation in the new plan.

***12-Month Base Payout Not a Remedy Legally Available to the Secretary to Prevent Shifting In and Out of the Pool.***

While the Secretary's decision in no way states that the purpose of the 12-month payout provision is to prevent producers from shifting between Orders 2 and 4, it may be argued that inferentially that was what the Secretary intended* for the Secretary says at 35 Fed. Reg. at 7936, column 3, that the proponents' purpose was to encourage a continuing even pattern of production throughout the year *and* to eliminate interorder shifting of plants and producers for the sole purpose of exploiting the different seasonal pricing plans of Order 2 and Order 4.

However, the supporting testimony for a 12-month payout provision by Dr. Hand related it basically to the purpose of bringing production into line with Class I utilization which we have previously disposed of, *supra* pp. 27-28. The District Court upheld the plan on the ground that it was necessary to remove the economic incentive for producers to shift among the various "regions" to take advantage of varying payout periods (JA 354).**

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* The logic of this is not clear in the District Court's decision because it erroneously believed the payout operated only in the flush (*supra* pp. 13, 37).

** Under the Louisville type of plan adopted in Order 2, amounts are subtracted from the pool during the flush months of March through June, thereby diminishing the uniform price during the

This is a non sequitur. Whatever the evils of shifting may be, so far as Order 4 is concerned they relate entirely to delivering milk to the Order 4 pool in the flush. However, neither the Secretary's decision nor the record furnishes the slightest factual evidence or even suggestion that it was necessary to penalize entry into Order 4 in the fall. Indeed the provisions are counterproductive as tending to exclude milk in the short season when it is most needed.

This also involves a clear error of law. The Secretary here has sought as an incident of a base-excess plan to reduce newly entering producers' returns for a period which, as we have shown, ranges from 5 to 16 months. The evil which he allegedly seeks to correct, the sporadic intrusion of outside producers into the order, is one which Congress specifically adverted to and for which it fashioned the exclusive remedy authorized in subdivision (D).* That subdivision provides that the *only* remedy which can be imposed on producers to prevent their sporadic intrusions into a pool is the limitation in subdivision (D) discussed

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flush months; these amounts are added back to the pool in the following short season of August through November, thereby increasing the blend price during those months. The juxtaposition of the two types of plans under two orders drawing milk from the same production areas causes the problem involved in this case. It results generally in the blend price under Order 4 being substantially higher in the flush months and lower in the short months than the blend prices under Order 2, providing an artificial incentive for shifting back and forth between the two orders. *This problem results entirely from the Secretary's decision to use different types of plans of levelling seasonal production in the two orders (see infra, p. 43).*

* The Congressional Reports in both Houses, discussed *supra* p. 23, state that subdivision (D) was specifically designed "to prevent assaults upon the price structure by the sporadic importation of milk" and that "this is the only limitation upon the entry of new producers—wherever located—into a market and it can remain effective only for the specified 3 month period." This is quoted and emphasized in the *Lehigh* case, 370 U.S. at 94-95.

above, *supra* pp. 22-23, and it can be effective for not more than three months.

It is clear that in view of the explicitly enunciated Congressional policy in subsection (D) against any other limitation on the access of outside producers to a Federal fluid milk market, the challenged provisions cannot be supported as incidental to a base-excess plan. The Secretary had no authority as an incident to his power to promulgate a base-excess plan to hang off it as an incidental provision any remedy designed to prevent sporadic intrusions into the Order 4 pool other than the remedy provided by subsection (D), for as the Supreme Court said in *Brannan* v. *Stark,* 342 U.S. 451:

> "The provisions cannot be incidental to the enumerated terms and conditions [in section 608c(5)] since they are inconsistent therewith." (p. 463)

***The Alleged Evils, to the Extent They Were Real, Could Have Been Corrected By Other Amendments to the Order Not Involving Discrimination Against Outside Producers.***

Whatever power the Secretary may have to prevent this type of activity, it is clear that the order adopted here went far beyond the evil. Producers (such as those here involved) shipping into Order 4 in the fall are shifting counterseasonally with no possibility of taking advantage of either order. They get a lower price under Order 4 than under Order 2. The District Court itself at the trial recognized that this case could not involve a situation of shifting to exploit the pool (JA 292-93).

If it is a vice for plants or producers to enter the Order 4 pool during the flush season, it is one which could and should be dealt with without imposing restrictions upon or economically punishing producers during other months of the

year, particularly where, as here, they enter Order 4 for legitimate business reasons and under circumstances which preclude riding the pool. As the Court pointed out at page 98 in the *Lehigh Valley* case, *supra*:

> "[T]here are other means available to the Secretary for achieving this result, while affording protection to pool producers, without imposing almost insuperable trade restrictions on the entry of nonpool milk into a marketing area."

The usual provisions of base-excess plans limiting the base payout period to the flush season would have corrected the evil since there is no undue advantage to shifting into Order 4 during the rest of the year.*

The record also shows that the major evil complained of was the shifting of plants (35 Fed. Reg. 7936, cols. 2-3; JA 274-75; Joint Exh. 1, pp. 737, 937, 958).

Order 4 could have required that a supply plant which entered the Order 4 pool in the spring flush months would be required to stay in the pool during the months of short supply—along the lines provided by the Secretary in Order 2 (7 C.F.R. 1002.28(c)) which provides, so far as pertinent, that "any plant which is a pool plant in any of the months of April, May, or June * * * shall be a pool plant in any of the months of July through March following in which 60 percent or more of the combined receipts * * * is classified in Class 1-A * * *".

In this light, the Secretary's refusal to adopt a Louisville plan as the seasonal levelling plan under Order 4 becomes clearly suspect.

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* Indeed, the Secretary found: "Because there is a close interrelationship between the Order 4 and Order 2 markets and they do draw to a considerable extent upon a common supply area, producers should not be unduly inhibited from shifting between the markets. (35 Fed. Reg. 7937, Col. 1)

***The Evil Sought to Be Corrected Was Self-Created By Order 4 Cooperatives In Order to Use It As a Basis to Bar Outside Producers—"Troubling the Waters In Order to Fish In Them".***

The Secretary's decision finds that the Louisville plan would be equally satisfactory for levelling seasonal production. The only reason given for not adopting the Louisville plan was that the inside cooperative, Pennmarva, preferred the base-excess plan which, incidentally, Pennmarva (the inside cooperative) itself proposed and the outside cooperatives opposed (35 Fed. Reg. 7936-37). Indeed the Secretary stated at 35 Fed. Reg. 7936:

> "Both the base-excess plan and the Louisville seasonal incentive pricing plan obviously can be effective in promoting a desirable seasonality of production in any particular market. Although both plans have wide acceptance, the plan provided in any particular market should be one which has the approval of a substantial majority of producers in such market. The cooperatives representing such a majority of the producers in the markets here being merged support a base-excess plan."

It is clear that the real reason* for this preference was not related to seasonal levelling of production but to the ulterior purpose of discouraging outside producers from entering the pool (JA 274-75).

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* This is particularly apparent from excluded Exhibit 16 for identification (JA 339) which shows the true considerations which Intervenor Pennmarva urged upon its members as the reasons for their voting for the new plan. This exhibit should have been admitted as an admission against interest by the intervenor and as part of the *res gestae.* It pointed out that "the only producer opposition came from New York cooperatives" and "if the plan does not receive a two-third favorable vote of those voting, we will have a wide open marketwide pool".

The adoption of the base-excess plan under Order 4 which shares a common production area with Order 2 (which regulates much more milk) was necessarily bound to result in substantially different prices month by month as between producers under Order 4 and those under Order 2 although producers under the two orders are intermingled and often situated one next door to the other.

Such a situation, the Secretary has repeatedly found, causes producer unrest and constitutes disorderly marketing. Thus in this very decision, in a slightly different context, the Secretary said at page 7925:

> "[T]he constantly changing relationship of blended prices * * * [among the three orders being merged] has tended to promote confusion and discontent among producers."
>
> * * *
>
> "* * * [A]ny significant changes (temporary or otherwise) in blend price relationships [among the orders] * * * causes much dissatisfaction among producers."

Similarly in his decision under Order 2 in Docket No. AO 71-A-32 he said:

> "There is no sound economic justification for regulation providing for differences in prices to neighboring producers in the common production area with such differences depending solely upon whether the milk is for consumption in Northern New Jersey or in New York City * * *" (22 Fed. Reg. 4198 (1957)).

It is clear that the adoption of a base-excess plan rather than the more satisfactory Louisville plan* was an attempt

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* It is a matter of record that Louisville plans have become more popular than base-excess plans over the years. (*Base Plans in U.S. Milk Markets*, Marketing Research Report No. 957, U.S. Department of Agriculture p. 6).

to trouble the waters so as to fish in them. A Louisville plan in Order 4 consistent with Order 2 would have eliminated all possibility of taking "unfair" advantage of either of the orders. The disorders which are complained of, we submit, are self-imposed by Order 4 in order to create a justification for imposing illegal restrictions on the entry of outside producers.

The Secretary also found two other alleged abuses of the old base-excess plan. These are discussed briefly in the footnote as they are irrelevant to the issues here.*

## CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the District Court appealed from should be reversed and the challenged provisions of Order 4 should be declared discriminatory, illegal and void, and it should be further adjudged that Dairylea's producer members are entitled to historical bases based on their marketings during the August-December 1971 period (whether under Order 2, Order 4 or otherwise) and that accordingly Dairylea is entitled to recover from the sums held in the reserve under Order 4 the difference between the amounts calculated under the invalid base provisions of Section 1004.92(e) and the amounts calculated under the proper bases as herein adjudicated with interest at the rate earned

* These were: (a) Abuses relating to the free transferability of bases; any vice as to this was completely cured by the provisions adopted in the current order prohibiting the transfer of bases; and (b) that deliveries from farms had been split so that only base milk was delivered to Order 4 and what would otherwise have been excess milk was delivered under another order. This abuse was in no way dealt with in the challenged provisions of Order 4 or otherwise.

by the reserve from the respective months of delivery of the milk; and awarding Dairylea such other and further relief as may be equitable.

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# APPENDIX

# APPENDIX

## (Statutes)

## 7 U.S.C. § 608c

(4) After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this chapter with respect to such commodity.

(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

* * *

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided*, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, (d) a further adjustment to encourage seasonal adjustments in the production of milk through equitable apportionment of the total value of the milk purchased by any handler, or by all handlers, among producers on the basis of their marketings of milk during a representative period of time, which need not be limited to one year; (e) a provision providing for the accumulation and disbursement of a fund to encourage seasonal adjustments in the production of milk may be included in an order; and (f) a further adustment, equitably to apportion the total value of milk purchased by all handlers among producers on the basis of their marketings of milk, which may be adjusted to reflect the utilization of producer milk by all handlers in any use classification or classifications, during a representative period of one to three years, which will be automatically updated each year. In the event a producer holding a base allocated under this clause (f) shall reduce his marketings, such reduction shall not adversely affect his history of production and marketing for the determination of future bases, or future updating of bases, except that an order may provide that, if a producer reduces his marketings below his base allocation in any one or more use classifications designated in the

order, the amount of any such reduction shall be taken into account in determining future bases, or future updating of bases. Bases allocated to producers under this clause (f) may be transferable under an order on such terms and conditions, including those which will prevent bases taking on an unreasonable value, as are prescribed in the order by the Secretary of Agriculture. Provisions shall be made in the order for the allocation of bases under this clause (f)—

(i) for the alleviation of hardship and inequity among producers; and

(ii) for providing bases for dairy farmers not delivering milk as producers under the order upon becoming producers under the order who did not produce milk during any part of the representative period and these new producers shall within ninety days after the first regular delivery of milk at the price for the lowest use classification specified in such order be allocated a base which the Secretary determines proper after considering supply and demand conditions, the development of orderly and efficient marketing conditions and to the respective interests of producers under the order, all other dairy farmers and the consuming public. Producer bases so allocated shall for a period of not more than three years be reduced by not more than 20 per centum; and

(iii) dairy farmers not delivering milk as producers under the order upon becoming producers under the order by reason of a plant to which they are making deliveries becoming a pool plant under the order, by amendment or otherwise, shall be provided bases with respect to milk delivered under the order based on their past deliveries of

milk on the same basis as other producers under the order; and

(iv) such order may include such additional provisions as the Secretary deems appropriate in regard to the reentry of producers who have previously discontinued their dairy farm enterprise or transferred bases authorized under this clause (f); and

(v) notwithstanding any other provision of this chapter, dairy farmers not delivering milk as producers under the order, upon becoming producers under the order, shall within ninety days be provided with respect to milk delivered under the order, allocations based on their past deliveries of milk during the representative period from the production facilities from which they are delivering milk under the order on the same basis as producers under the order on the effective date of order provisions authorized under this clause (f): *Provided,* That bases shall be allocated only to a producer marketing milk from the production facilities from which he marketed milk during the representative period, except that in no event shall such allocation of base exceed the amount of milk actually delivered under such order.

The assignment of other source milk to various use classes shall be made without regard to whether an order contains provisions authorized under this clause (f). In the case of any producer who during any accounting period delivers a portion of his milk to persons not fully regulated by the order, provision shall be made for reducing the allocation of, or payment to be received by, any such producer under this clause (f) to compensate for any marketings of milk to such other persons for such period or periods as necessary to insure equitable participation in marketings

among all producers. Notwithstanding the provisions of subsection (12) of this section and the last sentence of subsection (19) of this section, order provisions under this clause (f) shall not be effective in any marketing order unless separately approved by producers in a referendum in which each individual producer shall have one vote and may be terminated separately whenever the Secretary makes a determination with respect to such provisions as is provided for the termination of an order in subsection (16)(B) of this section. Disapproval or termination of such order provisions shall not be considered disapproval of the order or of other terms of the order.

* * *

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar months, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection.

* * *

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

* * *

(11)(B) Except in the case of milk and its products, orders issued under this section shall be limited in their application to the smallest regional production areas or regional marketing areas, or both, as the case may be, which the Secretary finds practicable, consistently with carrying out such declared policy.

* * *

(17) The provisions of this section and section 608d of this title applicable to orders shall be applicable to amendments to orders: *Provided,* That notice of a hearing upon a proposed amendment to any order issued pursuant to this section, given not less than three days prior to the date fixed for such hearing, shall be deemed due notice thereof.

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